In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 463

RAYMOND L. STOVER, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In accordance with Rule 23 of Supreme Court of the United States Revised Rules this Petition respectfully shows:

(a) The opinion of the United States Court of Appeals for the Ninth Circuit for this case, dated April 7, 1964, is set forth in Appendix "A" hereto. A copy of the Judgment is set forth in Appendix "B" attached hereto.

(b) The grounds on which the jurisdiction of this Court is invoked are:

(i) The judgment of the Trial Court was affirmed by the United States Court of Appeals for the Ninth Circuit on April 7, 1964.

(ii) A Petition for Rehearing was denied by the United States Court of Appeals for the Ninth Circuit on June 9, 1964.

(iii) The Supreme Court of the United States has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit by virtue of 28 USCA 1254.

(c) The Petitioners filed their consolidated actions against the United States of America under the Federal Tort Claims Act (28 USC 1346 and 2671 et seq.) for damages of $13,000,000.00 resulting to the one hundred and sixty-four plaintiffs in December, 1955 in Yuba and Sutter Counties of California, when federally-constructed levees collapsed along the Feather River and its tributaries. The complaint alleged negligence in the plan, design, construction, maintenance, and operation of the levees and other works comprising the Sacramento River Flood Control Project.

In its answer to the complaints here involved the United States asserted as an affirmative defense the provisions of Title 33 USC 702c which states:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . ."

The Trial Court ruled that this code section (702c) constituted an affirmative defense and ordered a trial on this special defense for all the pending cases. At the conclusion of this trial *solely on this special issue* the Trial Court ruled:

> "Said Section 702c provides the United States of America with a complete defense in these actions." (Cl. Tr. 77)

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the Trial Court saying:

> "We hold that 33 USC 702c is an immunity statute covering even ordinary negligent construction or maintenance of flood works . . ."

and

> "We affirm on the ground, negligence or no negligence, Section 702c precludes recovery here."

and held the statute constitutional.

The specific questions presented for review are:

1. Was the type of flood here involved the type of flood intended by Congress to be covered by 28 USC 702c?
2. Was Section 702c meant to be an immunity statute rendering the federal government immune from liability for its own negligence?
3. Is an immunity statute constitutional?

Additionally, and arising from the same floods, Petitioners had filed claims in the United States Court

of Claims, Actions 476-61 and 442-61, in behalf of each of the plaintiffs under the provisions of the Tucker Act (28 USC 1491), based upon inverse condemnation under the Fifth Amendment to the Constitution of the United States. Since the claims exceeded $10,000.00, they were required to be filed in the Court of Claims with respect to inverse condemnation by reason of 28 USC 1346. The claims were thus based upon certain classical condemnation concepts, for which the Fifth Amendment would have provided "just compensation".

However, the Court of Claims, in a ruling dated May 25, 1962, ordered the claims pending in that Court dismissed by reason of 28 USC 1500, on the ground that the actions were not maintainable because the same plaintiffs were maintaining suits in the United States District Court for the Northern District of California, arising out of the same flood, but based upon negligence. The United States Supreme Court denied *certiorari* (*Audet, et al. v. U.S.* and *Adams, et al. v. U.S.*, 371 US 83 S. Ct. 187 [1962]).

The dismissal of the inverse condemnation claims by the Court of Claims, and denial of *certiorari* by the Supreme Court was presumably based upon the fact that the same plaintiffs had an adequate remedy, namely the negligence causes of action in the United States District Court. But, the invoking by the Trial Court and by the United States Court of Appeals of the affirmative defense of 33 USC 702c, *effectively deprived petitioners of any remedy whatsoever*, and

destroyed, in violation of due process, the constitutional remedy in inverse condemnation which would otherwise have been available under the Fifth Amendment. This is an additional basis for the present Petition for Writ of Certiorari.

(d) The Constitutional provision involved is the Fifth Amendment to the United States Constitution which provides:

> "No person shall . . . be deprived of life, liberty, and property, without due process of law . . ."

The federal statutes involved are the Federal Tort Claims Act (28 USC 1346) and a portion of the Flood Control Act (33 USC 702c) which reads:

> "No liability shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . ."

STATEMENT OF THE CASE

(e) Over a period of approximately half a century prior to 1955 the Federal Government, together with the State of California, planned, designed and constructed an extensive system for flood control in the Sacramento Valley in California. This flood control project included a system of levees on the Feather River and its tributaries.

The Feather River basin is located on the western slope of the Sierra Nevada Mountain range, northeasterly from the Sacramento Valley. The basin in-

cludes the drainage areas of the Feather River and its tributaries, principally the Yuba and Bear Rivers, and covers approximately 5,900 square miles ranging in elevation from about 30 feet to about 10,000 feet. (R.T. 320-321.)

During the early part of December, 1955, two storms swept over the entire Feather River basin. This early rainfall prepared the ground for the later disastrous events by soaking the soil to a near saturation point. On December 16, the first major storm of a series arrived at the Feather River basin. It was a warm-type storm and extended over the entire area, climaxing in heavy rain on the 18th and 19th. Snow fell during this storm only at elevations above 6,000 feet. Since the soil had been primed earlier, rivers and streams rose sharply. A second major storm followed on the 21st and 22nd and this was followed by a third warm storm on the 22nd and 23rd of December. (R.T. 361-364.)

The water from all these storms drained into the levee system on the Feather. Prior to December 23, 1955, these waters had overflowed the natural banks of the Feather, Yuba, and Bear Rivers but were being contained by the levees.

On December 23-24, 1955, breaks occurred at three points in these levees resulting in inundation of approximately 85,000 acres. (R.T. 323:1.) One of these breaks, referred to as the Gum Tree break, took place in the right levee of the Feather River just downstream from Yuba City a short distance downstream

from the confluence of the Feather and Yuba Rivers, and was a specific factor in the inundation of Yuba City. A second break occurred in the left levee of the Feather River just downstream from the town of Nicolaus a short distance downstream from the confluence of the Feather and Bear Rivers, and is referred to as the Nicolaus break. A third area of inundation, caused by a series of breaks, occurred to the west of the right levee of the Western Pacific Interceptor Canal which normally drains into the Bear River from the North. (R.T. 323-336.)

As a result of these levee breaks, water flowed over lands of the Feather River Basin, causing the damage of which plaintiffs complain.

The trial Court found, as a fact, that the streamflow at the time of these levee breaks resulted from what it termed "unusual and extraordinary climatic conditions", ruled that water which has overflowed the natural banks of a stream is "flood water" even though that water is contained by a system of levees, and therefore the trial Court ruled, the United States Government cannot be held liable for negligence or deliberate conduct in the plan, design or construction of the levee system even though such negligent or deliberate conduct proximately caused the levee breaks and the resulting destruction.

The trial Court specifically ruled that "proximate cause" was not an issue in the case even though plaintiffs offered to prove that the Gum Tree and Nicolaus breaks were proximately caused by the deliberate act

of the Federal Government in the summer of 1955 in diverting approximately 60,000 cfs of water from its natural drainage in the vicinity of Hamilton Bend near Oroville on the Feather and thus causing that 60,000 cfs of water to flow to Gum Tree and Nicolaus which nature never would have brought within twenty-five miles of these locations.

The trial Court specifically refused to permit plaintiffs to prove the amount of water which was flowing within the confines of the levees at the time of each break even though plaintiffs desired to prove that the Government knew that the amount which flowed at Gum Tree at the time of the break was approximately 300,000 cfs, that the 60,000 cfs diverted in the vicinity of Hamilton Bend increased the flow at Gum Tree and Nicolaus from safe channel capacity to an amount which caused the breaks, and that when the section of levee on the right bank of the Feather (referred to as the Cox Ranch-Hamilton Bend levee) was constructed in the summer of 1955 the Federal Government knew that four times in the preceding fifty years the amount of water flowing at the scene of the Gum Tree break would have exceeded the safe channel capacity except for the fact that a large volume of water had historically flowed west at Hamilton Bend across the plains north of the Sutter Buttes and into the Butte Basin on the west side of the Sutter Buttes. The 1955 levee construction by the Government closed this natural spillway and rendered inevitable the Gum Tree and Nicolaus breaks in De-

cember of 1955, but the trial Court ruled that these facts were "immaterial" to any issue in the case.

Plaintiffs offered to prove many negligent acts of the United States Government which each proximately contributed as a cause of each levee break but the trial Court sustained objections to the introduction of such proof.

In a broad sense the trial Court took the position that Section 702c created a defense in a case involving damage from a natural flood. Petitioners were prepared to prove that the flood was not a natural flood, but a *man-made flood*. The trial Court refused to permit Petitioners to even introduce evidence to support their contention that this was a man-made flood.

The trial Court was preoccupied with the question whether there was a flood, gave lip-service to the proposition that the issue in the case was whether the flood was man-made or natural, but consistently refused to hear any evidence tending to prove the flood on Petitioner's lands was man-made.

THE ISSUE IS NOT WHETHER THERE WAS A FLOOD. OF COURSE THERE WAS A FLOOD.

The issue is whether this flood was the type of flood meant by Congress when it said "no liability shall attach . . . for any damage by or from floods or flood waters."

The case involved two major points:

1. Was there a flood?

2. Was this flood natural or man-made?

The trial Court never reached the key points of the case.

(f) Not applicable.

(g) The basis for federal jurisdiction in the United States District Court is the Federal Tort Claims Act (28 USC 1346).

(h) Argument.

A. BASIC CONTENTION OF PETITIONERS

The basic contention of Petitioners is that 33 USC 702c is a legislative recognition of the principle that the Government is not liable for damage proximately caused solely by an act of the elements, and that Section 702c does not prevent liability on the part of the United States where its negligence is either the sole proximate cause of damage, or proximately causes damage whether or not combined with an act of the elements or an "Act of God."

Petitioners specifically assert that Section 702c is not an immunity statute, and that the Government is liable under the Federal Tort Claims Act for negligent flood control activity.

B. CONGRESSIONAL HISTORY OF 33 USC 702

The trial Court confined its order for a separate trial to the affirmative defense of the United States to its claim of exemption from liability under Title 33, United States Code Section 702c. However, we respectfully suggest that certain other Sections of the

United States Code should be considered in order to obtain the full meaning of the claimed "flood or flood waters" exemption.

While the Corps of Engineers of the United States Army had been working on flood control problems for many years, the first "Flood Control Act" setting forth a definite policy of flood control of the Congress of the United States was passed on March 1, 1917. This law contained four sections, which, in the United States Code Annotated, are now codified as follows:

Section 1—33 USCA 702 (Mississippi River)

Section 2—33 USCA 703 (Sacramento River)

Section 3—33 USCA 701 (Flood Control Generally)

Section 4—33 USCA 702-H (Placing flood control projects under Corps of Engineers).

The 1928 Flood Control Act was frequently spoken of as the "Second Flood Control Act." In 1927 the Mississippi River and its tributaries experienced an extensive flood in which 12,500,000 acres were inundated, 600,000 people were rendered homeless, and property was damaged to an extent of $400,000,000. (Congressional Record, 70th Congress, 1st Session, page 7118.). In the 1928 Congress (the 70th Congress) a detailed law was developed and passed for the purpose of controlling floods on the Mississippi and its tributaries. This law, known as Public Law No. 391, contained *fourteen* sections, only one of which (Section 13) in any way referred to territory outside the Mississippi watershed. The exception—Section 13—is now found in 33 USCA 704, and reads as follows:

> "The project for the control of floods in the Sacramento River, California, adopted by section 703 of this title, is modified in accordance with the report of the California Debris Commission submitted in Senate Document Numbered 23, Sixty-ninth Congress, first session: *Provided,* That the total amounts contributed by the Federal Government, including the amounts heretofore contributed by it, shall in no event exceed in the aggregate $17,600,000. May 15, 1928, c. 569, sec. 13, 45 Stat. 539."

Other than this one quoted section, the entire 1928 flood control law dealt solely with the Mississippi River and its tributaries. *All* the provisions of the 1928 law except Section 13 (now 33 USCA 704) are now contained in the 702 series of Title 33, United States Code. The precise words here involved are:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters in any place:" (33 USCA 702)

When the 1928 flood control bill was first presented to Congress, this language was not in the bill. The initial draft of the bill contained the following language:

> "Just compensation shall be provided by the United States for all property used, taken, damaged, or destroyed in carrying out the flood control plan provided for herein." (Congressional Record, 70th Congress, 1st Session, page 6665)

There was a tremendous amount of discussion about this "Section 4" of the bill, ranging from urging

enactment in the form just quoted, to leaving everyone to their rights under the Constitution.

Congressman Kopp said:

> "All the language in Section 4 of the bill enlarging the rule of damages fixed by the Constitution should be stricken out." (Cong. Rec. 70th Cong., 1st Session, page 6712)

Congressman Davenport said:

> "Is there not protection enough against damage for them in the constitution?" (Cong. Rec. 70th Cong. 1st Session, page 6716)

Congressman Frear was criticizing the original "just compensation" provision when he was asked by *Congressman Cox;*

> "I would like to inquire of the gentleman if he favors the taking or damaging of private property for public use without compensation?"

To which *Congressman Frear* replied:

> "Why no; certainly not . . ." (Cong. Rec. 70th Cong. 1st Session, page 7000)

Congressman Reid, in discussing the change to the bill as it was finally enacted said that the sense of the change is:

> ". . . that the government shall be liable where it diverts the water from the main channel." (Cong. Rec., 70th Cong., 1st Session, page 7001)

In order to fully understand Congressman Reid's comment, we set forth here in full the pertinent sections referred to by Congressman Reid which are now 33 USCA 702b, 702c, and 702d, as follows:

702b

"It is declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, prior to May 15, 1928, made by the local interests in the Alluvial Valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required. May 15, 1928, c. 569, sec. 2, 45 Stat. 535."

702c

"Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of sections 702a, 702b, 702d, 702e, 702g, 702h, 702j, 702k, 702l, and 702m of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of

the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided however,* That if in carrying out the purposes of sections 702a, 702b-702d, 702e-702g, 702h-702j, 702k, 702l, and 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands. May 15, 1928, c. 569, sec. 3, 45 Stat. 535."

702d

"The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided,* That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

"The Secretary of the Army may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of the Army and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the practice, pleadings, forms, and modes or proceedings shall conform as near as may be to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding. When the owner of any land, easement, or right of way shall fix a price for the same, which, in the opinion of the Secretary of the Army, is reasonable, he may purchase the same at such price; and the Secretary of the Army is also authorized to accept donations of land, easements, and rights of way required for this project. The provisions of sections 594 and 595 of this title are made applicable to the acquisition of lands, easements, or rights of way

needed for works of flood control: *Provided,* That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests. May 15, 1928, c. 569, sec. 4, 45 Stat. 536; Nov. 30, 1945, c. 496, 59 Stat. 587."

These just quoted sections were Sections 2, 3 and 4 of the bill then under consideration.

On reading these three sections together, it becomes apparent what Congressman Reid meant when he said that the government shall be liable where it "diverts the water from the main channel." The intent was to provide compensation under such circumstances. There was no intent to deny anyone their rights under the Constitution. In 1928 negligence claims against the Federal Government were not recognized (except under "private" bills), and the entire discussion in the Congress centered around the rights of persons under the Fifth Amendment to the Constitution.

Congressman LaGuardia said:

"There is no one who contends that property should be taken without compensation. There is no one who contends that property that is damaged by the work of the government should not be paid for . . ." (Cong. Rec., 70th Cong., 1st Session, page 7002)

There was considerable discussion as to damages where "additional destructive flood waters" (Sec. 702d) were diverted from the main channel of the Mississippi River. Comments were made to the effect that there should not be compensation paid where the

water already "overflowed" in times of high water, as such place would be a "natural flood way" to which *Congressman Wilson* said:

> ". . . the fact that 300,000 cfs of water went through there does not justify the statement that there is a natural floodway whereby you can divert 700,000 to 900,000 cfs of water without any compensation for the damage it causes." (Cong. Rec., 70th Cong., 1st Session, page 7004)

On this same point in the Senate discussions, *Senator Reid* said:

> "The United States will not now have to pay for flowage rights over lands now used in conducting the destructive water from the main Mississippi River . . . If the work puts any additional flood destruction on those lands, that must be provided for." (Cong. Rec., 70th Cong., 1st Session, page 8122)

Senator Wilson, in the course of an extensive discussion of the section here under consideration said:

> "The object and intention of Section 4 is that the government shall provide rights of way and construct protective works where the flood waters are to be diverted . . ." (Cong. Rec., 70th Cong., 1st Session, page 8211)

From this Congressional History of the Mississippi Flood Control Act we conclude that Congress did not want to enlarge the rights of those who were damaged by floods, nor did the Congress wish to take away their rights. The Congress merely wanted the statute to reflect what it then believed the law to be as to the constitutional rights of persons damaged by floods.

As *Congressman Spearing* said, after specifically referring to the "flood or flood waters" clause:

> "While it is wise to insert that provision in the bill, *it is not necessary,* because the Supreme Court of the United States has decided . . . that the government is not liable for these damages." (Italics ours) (Cong. Rec., 70th Cong., 1st Session, page 7028)

In other words, Congress did not want anyone to conclude that the federal government would be liable for damages from floods merely because it had embarked on a flood control program. We feel it significant that the "exemption" does *not* say no liability shall rest upon the United States for any damage due to the *flood control works.* It says no liability from or by "floods or flood waters". If Congress had meant to create an immunity on the part of the federal government as to damages resulting from the flood control project, how easy it would have been to have used the words "flood control works", or "flood control plan" as the first draft of the bill was worded.

It is a well recognized principle of statutory interpretation that a change in language during the consideration of a bill by the Congress is a strong argument that the new language was not intended to mean the same as the former language. As the text reads in 50 *Am. Jur.* 332, Statutes, section 329:

> ". . . a change in the language of a bill during the course of its adoption, indicates an intention to enact a provision different in effect than that called for by the original language."

Here, the original language of the section referred to damage *"in carrying out the flood control plan"* whereas the amendment referred to damages *"from or by floods or flood waters"*. Had the Congress intended to preclude any and all damage claims resulting, even in part, from the flood control project, they would have said:

> "No liability of any kind shall attach . . . for any damage in carrying out the flood control plan."

The Congress did not say there shall be no liability because of the *project,* but that there shall be no liability because of *floods.*

In 1928 there was considerable doubt whether, under the Constitution, the word "taken" included the word "damaged". Recent Supreme Court cases have clarified that point so that private property which is so damaged as to be destroyed is deemed "taken" under the Fifth Amendment. This is clear from the recent cases of *United States v. Chicago, B. & O. Ry. Co.,* (1936) 86 F. 2d 131; *United States v. General Motors,* (1945) 323 US 373, 89 L.Ed 311; *United States v. Kansas City Life Ins. Co.* (1950) 339 US 797, 94 L.Ed 1277; also see annotation in 94 L.Ed 1292.

There was considerable discussion on the floor of the House of Representatives when the "flood or flood waters" exemption was being considered as to whether "damaging" was included in the word "taken" in the Fifth Amendment. *Congressman Cox* argued extensively that under the cases of *Bedford v. U. S.*

(1904) 192 U.S. 217, *Mills v. U. S.* (1891) 46 Fed. 738, and *U. S. v. Lynath* (1903) 188 U.S. 445 no action would lie against the United States for "damaging" as distinct from "taking". (Cong. Rec., 70th Cong., 1st Session, pages 7106-7107.)

To this proposition Congressmen Frear and Dempsey replied saying there should be recovery for "damaging".

Congressman Frear said:

> "Now, if there are no damages . . . that can be collected against the Government of the United States, I say they ought to have damages . . . I am willing in subsequent legislation to give them an immediate right to show their damages in court." (Cong. Rec., 70th Cong., 1st Session, page 7108)

And Congressman Dempsey said:

> "Is there any doubt that if an amendment is needed to the Law (to reimburse for actual damages) that the Congress will be ready to send him to the courts to determine what actual damage he has sustained." (Cong. Rec., 70th Cong., 1st Session, page 7108)

Here we have Congressional history support for the proposition that Congress did not intend to deprive persons of any right to redress for private property damaged for a public purpose, but an affirmative indication that if there was any question, the Congress would enact legislation to permit recovery

for property damaged as a result of the flood-control project.

In 1928 there was no Federal Tort Claims Act, and there was no recognized cause of action for negligence against the federal government. Throughout the congressional debates in both Houses of Congress the term "negligence" was never used and the concept of negligence or tort was never alluded to. We have read every word in the Congressional Record relating to the 1928 flood control bill and make that statement flatly. Even the *original* language of section 4 was intended by the author of the bill to refer *only* to rights under eminent domain, as is evident from the remarks of *Senator Jones*, the sponsor of the bill, when he said:

> ". . . section 4 provides for just compensation, and is framed on the theory of the constitutional provision that where property is taken for a public use it must be paid for." (Cong. Rec., 70th Cong., 1st Session, page 5487)

When the Federal Tort Claims Act was under consideration in Congress, the question of liability for damage resulting from negligence in connection with a flood control project was referred to repeatedly.

In Reports of the Committee on the Judiciary of both the Senate and the House of Representatives each report stated that there was an intent to preclude liability for flood damage "where no negligence is shown" in the enactment of the "discretionary function" exemption to the Federal Tort Claims Act.

The only logical conclusion to this oft-repeated statement is that liability is recognized for flood damage *where negligence on the part of a government agent is shown.*

The Judiciary Reports referred to, *each* using the same language, said:

> "The first subsection of section 402 exempts from the bill claims based upon the performance or non-performance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, *such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown,* and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid."

The Reports containing the quoted language are:

1. House Report No. 2245, 77th Congress, 2nd Session, June 16, 1942.
2. Senate Report No. 1196, 77th Congress, 2nd Session, March 25, 1942.
3. House Report No. 1287, 79th Congress, 1st Session, November 26, 1945.

From this review of congressional history we draw five conclusions:

1. There was no intention on the part of Congress to deprive any person of any right under the Fifth Amendment.

2. There was no intention on the part of Congress to deny, or to grant, any person any cause of action based on negligence. Negligence did not enter the "Stream of consciousness" of Congress because tort claims against the federal government were not recognized in 1928.

3. Section 702c was meant to make it clear that no claim for damage from or by a *natural* flood would be a basis of liability against the federal government.

4. Congress intended to recognize the right to compensation for damages resulting from "*additional destructive flood waters* that will pass by reason of *diversions from the main channel* of the Mississippi."

5. When Congress considered the Federal Tort Claims Act in the 1940's, it recognized that negligence on the part of a government agent on a flood control project would be compensable.

C. CASE HISTORY OF SECTION 702c

The United States Supreme Court has never ruled on Section 702c. We respectfully submit that the

construction and the constitutionality of Section 702c are important questions of federal law which have not been, but should be settled by the United States Supreme Court within the purview of Rule 19—"Considerations Governing Review on Certiorari."

Prior to the opinion of the Court of Appeals for the Ninth Circuit in the case at bar, Section 702c had only been considered by a United States Court of Appeals on two occasions. These two cases were *Clark v. United States* (CCA 9th, 1954), 218 F. 2d 446 and *National Mfg. Co. v. U.S.* (CCA 5th, 1954), 210 F. 2d 263.

We respectfully submit that both of these cases reflect the now rejected philosophy of the case of *Dalehite v. U.S.* (1952), 346 U.S. 15 and should be rejected as controlling authority by the United States Supreme Court.

D. THE MEANING OF SECTION 702c —An "Act of the Elements" Defense.

The specific portion of Section 702c upon which the government relies for its defense reads:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

After reviewing the Congressional history of the 1928 Flood Control bill and the case history concerning federal liability for flood damages, we respectfully suggest that the quoted sentence means that the

United States shall not be held liable for damage from or by *natural* floods or *natural* flood waters *simply* because the United States has undertaken the task of minimizing flood damage. It is an "*Act of the Elements*" defense.

Nothing else should be read into this Section of the Code.

It does not say the United States is not liable for damages from or by flood control projects.

It does not say the United States is not liable for damages "due to the construction works", although this phrase is contained in the hold harmless clause both in Section 701c and Section 702A-12. Under rules of statutory construction, different phrases in the same chapter of the United States Code should be construed to have different meaning. Further, if Section 702c means there is no liability for damage due to the construction works, there is very little necessity for a hold-harmless clause in the Flood Control Act. We assert that there is liability under the Federal Tort Claims Act for damages "due to the construction works" and that the hold-harmless clause is an attempt to the extent that it can, for the federal government to shift such financial responsibility to the State.

The legal situation is similar to the situation in the case of *U. S. v. Sponenbarger* (1939), 84 L. Ed. 239 in which the Court said:

> "If major floods may sometime in the future overrun the river's banks *despite—not because of*—the government's best efforts, the government

> has not taken respondent's property. . . . . The *government* has not subjected respondent's land to any additional flooding, above what would occur if the government had not acted." (Italics ours.)

Implicit in these words of the Supreme Court is that there would be liability if, *because of*—not despite—the government's best efforts, plaintiff's property had been taken or destroyed. And now, under the Federal Tort Claims Act, if "because of" negligence of the government, property is destroyed, there is liability.

The language employed by the Court in the *National Manufacturing* case, supra, carried the same meaning when it said:

> ". . . where there is damage 'from or by' a flood or flood waters *in spite of and notwithstanding* federal flood control works, no liability of any kind may attach to or rest upon the United States."

Section 702c means if natural floods or natural flood waters cause damage despite—not because of—the government flood control works, the government is not liable.

Using the language of the *Sponenbarger* case, Section 702c means that *only* if the government has not subjected plaintiffs' property to any additional flooding above what would have occurred if the flood control project had not been built, the government will not be liable.

TO CONSTITUTE A DEFENSE UNDER SECTION 702c, (IF IT IS A DEFENSE AT ALL) DEFENDANT MUST PROVE THAT THE DAMAGE TO PLAINTIFF'S PROPERTY WOULD HAVE OCCURRED IF THE FLOOD CONTROL PROJECT HAD NOT BEEN BUILT.

The general rule with reference to "Act of God" defenses is that the Act of God must be the sole cause of the damage, and that if any act of man combines with an Act of God, there is liability on the negligent man.

In other words, an Act of God does not excuse negligence. The Act of God, to be a defense, must be the *sole* proximate cause of the damage.

Viewing the defense from another angle, the "defense" of Act of God simply means that the defendant was not negligent, or otherwise guilty of liability-creating conduct.

That this is the rule is clear from the case law. The general statement in 169 ALR 533 says:

> "It is the general rule that it is a defense to an action for damages from escaping waters . . . that the escape of the waters was caused wholly by an Act of God."

We have found no United States Supreme Court case which states this rule, but in the case of *Inland Power & Light Company v. Grieger* (1937) (Ninth Circuit) 91 F 2nd 811, 112 ALR 1075, the Court said:

". . . where the damage is the result of two concurring causes, one of which is the negligence of defendant and the other the negligence of a third person the defendant is liable to the same extent as though it had been caused by his negligence alone." . . .

"Is there any different rule where the concurring causes of the damage are an act of God and negligence of the defendant? By the overwhelming weight of authority the rule is the same."

In the *Inland Power* case the Court held the defendant liable for all the damage from the flood in a case where the defendant's negligence only caused six per cent of the water to flow on plaintiff's land.

The general rule is stated in 38 *Am.Jur.* 719, Negligence, Sec. 65 "Natural Forces or Conditions; Act of God or Inevitable Accident":

"The general rule is that when the negligence of a responsible person concurs with an ordinary flood, storm, or other natural force, or with a so-called act of God, in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences, if the injury would not have happened except for his failure to exercise care."

If an "Act of God" is the sole cause of damage, the defendant would prevail, not, because he proved an Act of God, but because the plaintiff failed to prove the defendant's conduct was a contributing proximate cause of the damage. The principle is the same as the so-called "unavoidable accident" defense,

which is not a defense at all, but merely a situation in which the plaintiff fails to prove actionable conduct on the part of the defendant proximately contributing to plaintiff's injury. Just as there is no such thing as a "defense" of unavoidable accident, there is no such thing as a "defense" of Act of God.

See, *Butigan v. Yellow Cab Co.* (1958) 49 Cal. 2nd 652, 320 P. 2nd 500.

E. CONSTITUTIONALITY OF SECTION 702c

Only if the Court disagrees with the proposition that Section 702c is not an immunity statute does it become necessary to consider the constitutionality of Section 702c.

If Section 702c be construed to create immunity from negligent conduct on the part of the federal government, we respectfully submit that Section 702c is unconstitutional.

Can a governmental body create its own immunity? A private person cannot. In a nation of free men, we respectfully submit, neither can the government.

"Sovereign" immunity it is called. Sovereign? Who has sovereignty in the United States of America? While it is proper to speak of the government as sovereign when considering the relations between governments, when we consider the relationship between the people and *their* government, are not the people sovereign?

Are not the people the masters, and the government the servant of the people? Should the servant be able to create its own immunity as against its master? Is it not just as incongruous as my creating my own immunity?

Several state Supreme Courts have recently rejected the concept of sovereign immunity and declared that under the Common Law sovereign immunity never did exist.

Muskopf v. Corning District Hospital, 55 Cal. 2nd 211, 359 P. 2nd 457;

Molitor v. Kaneland Community Dist., 18 Ill. 2nd 11, 163 NE 2nd 89;

Colorado Racing Comm. v. Brush Racing Assn. 136 Colo. 279, 316 P. 2nd 582;

Hargrove v. Town of Cocoa Beach (Fla.) 96 So. 2nd 130;

Williams v. City of Detroit, 364 Mich. 231, 111 N.W. 2nd 1;

Holytz v. City of Milwaukee, 17 Wisc. 2nd 26, 115 N.W. 2nd 618;

Spanel v. Mounds View School Dist., Minnesota Supreme Court, No. 38513, December 14, 1962.

A reading of the famed case of *Chisholm v. Georgia*, (1793) 2 U.S. 16 reveals a philosophy directly contrary to sovereign immunity as the case utterly rejects the idea that the government is superior to the individual and reflects equality of the individual with the government: it rejects the idea of men's rights being derived from the government

but asserts that the rights of the government come only from the people; it rejects the concept that the government must give its consent to be sued; it rejects the concept of sovereign immunity in a nation of free men.

We respectfully submit that sovereign immunity does not exist.

We respectfully submit that the people have a basic, inalienable right to sue their servant, the government.

Repeatedly it has been held, and we think correctly, that a right cannot be destroyed by the legislature unless a reasonable substitute is provided. This principle has been held in the following cases:

Stewart v. Houk (Oregon) 271 Pac. 998;
Coleman v. Rhodes (Delaware) 159 Atl. 649;
Ludwig v. Johnson (Ky.) 49 S.W. 2nd 347;
Heck v. Schupp (Illinois) 68 N.E. 2nd 464;
Noel v. Menninger Foundation (Kan.) 267 P. 2nd 934;
Lebohm v. Galveston (Tex.) 275 S.W. 2nd 951;
New York Central Ry. v. White, 243 U.S. 188, 61 L.Ed 677.

That the government cannot create its own immunity is implicit in the cases of:

Wren v. Corsicana (Tex., 1958) 309 S.W. 2nd 402;
Savannee Hospital v. Golden (Fla., 1952) 56 So. 2nd 911;
Ettor v. City of Tacoma (1913) 228 U.S. 148;
Gulf Transit Co. v. U.S. (1908) 43 Ct. Cl. 183.

Any attempt to create immunity on the part of the government would be unconstitutional as a denial of due process under the principles of these just cited cases.

The tottering doctrine of sovereign immunity has been under attack in the Supreme Court of the United States for a number of years. In 1938 Justice Frankfurter described the doctrine as "legal irresponsibility" (*Keifer v. RFC,* 306 U.S. 389, 83 L.Ed. 784 at 788, and in 1954 in the case of *National City Bank v. Republic of China,* 348 U.S. 357, 99 L.Ed. 389 he said:

> "But even the immunity enjoyed by the United States as a territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment."

As Justice Brennan said in his dissenting opinion in the case of *Barr v. Matteo,* (1959) 360 U.S. 564, 3 L.Ed. 2nd 1434

> ". . . the courts should be wary of any agreement based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of business. Such a burden is hardly one peculiar to public officers; citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice.
>
> . . .

but the way to minimize the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong. The method has too much of a flavor of throwing out the baby with the bath . . ."

Chief Justice Warren said in his dissent in the same case:

"The principal opinion in this case . . . has not given even the slightest consideration to the interest of the individual . . . It is a complete annihilation of his interest."

Justice Douglas and Justice Harlan, dissenting in the case of *Malone v. Bowdoin,* (1962) 8 L.Ed. 2nd 168 at 174 said:

"Sovereign immunity has become more and more out of date, as the powers of the government and its vast bureaucracy have increased."

Concepts which are basically unfair eventually fade, wither, and die. Are not these words of Chief Justice Warren and Justices Douglas, Harlan, and Brennan the soft chant in the background of the requiem of the doctrine of sovereign immunity whose demise has occurred and should now be announced!

We respectfully submit that if sovereign immunity does not exist as a part of the Common Law, the government has no constitutional power to create its own immunity as against its sovereign masters—the people of the United States. To uphold an immunity statute is to sanction the destruction of rights of

action. The power to legislate is not the power to destroy.

The real purpose of the due process clause is to protect the individual from basically unfair conduct by his agent, the government. 12 *Am.Jur.* 271, Const. Law. Sect. 575.

It was in the case of *Rochin v. California*, (1952) 342 U.S. 165 that the Supreme Court of the United States said so clearly that conduct which "offends a sense of justice" is a denial of due process, and that conduct which "offends the community's sense of fair play and decency" is a denial of due process.

The concept of governmental immunity from tort liability means simply that if an individual carelessly destroys governmental property the government can sue and recover damages from the individual, but if the government carelessly destroys that same individual's private property, the individual cannot recover damages from the government for the same misconduct.

We respectfully submit that this proportion "offends a sense of justice", "shocks the conscience", and "offends the community's sense of fair play and decency."

We respectfully submit that the time has come for the Supreme Court of the United States to reconsider the entire doctrine of sovereign immunity, whether that doctrine be reflected through court decisions or through legislative enactments.

It is basically unfair.

F. PETITIONERS WERE DEPRIVED OF THEIR REMEDIES IN INVERSE CONDEMNATION UNDER THE FIFTH AMENDMENT, AND, IN EFFECT, HAVE NO REMEDY.

Reference is made to the denial by the Supreme Court of Petitions for Writs of Certiorari in *Audet, et al. v. U. S.* and *Adams, et al., v. U.S.*, 371 U.S. 889, 83 S.Ct. 187 (1962), (see subdivision (*e*) of this Petition hereinabove).

It will be noted that Petitioners had filed with the Court of Claims actions based upon inverse condemnation under the Fifth Amendment to the Constitution of the United States—". . . nor shall private property be taken for public use without just compensation." 28 USC 1346.

These claims could not be maintained in the United States District Court because they exceeded $10,000.00 in amount. 28 USC 1500. They were therefore filed in the United States Court of Claims which promptly proceeded to dismiss them on the alleged ground that the same claimants had actions pending, against the United States for negligence in the United States District Court. The United States Supreme Court denied certiorari, but at a time when presumably the plaintiffs still had their remedies available to them by way of negligence counts under the Tort Claims Act so that they would be able to assert remedies for their damages against the United States. It was therefore not material whether they recovered in negligence or in inverse condemnation, since they would be compensated in any event. Hence, the dismissal of the Court of Claims cases theoretically left these

plaintiffs with valid causes of action in negligence pending in the United States District Court.

When, however, the District Court held that 33 USC 702c was a complete bar to the negligence cases, then the plaintiffs were deprived of any remedy whatsoever in violation of Amendment V of the United States Constitution. We submit that it is not constitutionally possible to *destroy all remedies available to these parties* without a violation of due process. Since the dismissal of the Court of Claims actions is a final adjudication, then it inalterably follows that there is a deprivation of constitutional rights in a judgment which now purports to invoke the bar of section 702c.

The right to damages for inverse condemnation is a constitutional right under the Fifth Amendment to the Constitution. *Coates v. U.S.*, (1950) 117 Ct. Cl. 795; *Coates v. U.S.*, (1953) 110 Fed. Supp. 471; *Youngblood v. Los Angeles County Flood Control District*, (1961) 56 Cal. 2nd 603, 364 P. 2nd 840.

Reference is further respectfully made to the Petition for Writ of Certiorari on file in the United States Supreme Court with respect to the Court of Claims ruling.

CONCLUSION

We respectfully submit that a Writ of Certiorari should be granted as the construction and constitutionality of 33 USC 702c are important questions of law which have not been, but should be, settled by the Supreme Court of the United States, and also because the time has come where the Supreme Court of the United States should reconsider the concept of sovereign immunity in all its aspects, and also because petitioners have been unconstitutionally deprived of their remedies in inverse condemnation by reason of the invocation of 33 USC 702c.

Dated, Chico, California.
September 1, 1964.

Respectfully submitted,
P. M. BARCELOUX,
Attorney for Petitioners.

BURTON J. GOLDSTEIN,
REGINALD M. WATT,
Of Counsel.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Raymond L. Stover, et al., Appellants, vs. United States of America, Appellee.	No. 18,275

[Apr. 7, 1964]

Appeal from the United States District Court
for the Northern District of California,
Northern Division

Before: CHAMBERS and DUNIWAY, Circuit Judges, and TAYLOR, District Judge.

CHAMBERS, Circuit Judge:

Stover is one of 164 plaintiffs from the vicinity of Yuba City, California, who suffered damage when waters from the Feather River or its tributaries ran over their lands late in December, 1955. They allege this happened because some federally constructed levees broke. The trial court has held that 33 U.S.C. § 702c,[1] on the facts here, insulates the United States from liability. We affirm.

[1] 33 U.S.C. § 702c, in pertinent part, provides:
"No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *"
The language originated in an act of Congress affecting the Mississippi River. 45 Stat. 535.

Apparently in the summer of 1955 a flood control project, under way for many years, on the Feather River and its tributaries, the Yuba and the Bear, was completed. At that time an overflow escape at the place called Hamilton Bend was sealed off. Had not the Hamilton Bend escape been closed, the levees would have not broken and the plaintiffs would not have been injured, it is alleged.[2] Apparently the water would have flooded other lands which historically had been subject to flooding. Plaintiffs, in effect, say that what the new system actually accomplished was to protect someone else by injuring plaintiffs.

The Feather River and its tributaries had natural streams and natural banks. The levees were set back and away from the banks. At the time of the floods, the waters would leave the banks and were supposed to be contained by the levees.

The trial court had a trial on the applicability of § 702c.

In a pre-trial order the court ruled that 33 U.S.C. § 702c "applies to all floods and flood waters which result in whole or in part from unusual or extraordinary precipitation" and defined "unusual or extraordinary" as meaning "conditions which, in the light

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[2]Plaintiffs also contended there was negligent construction at the points of the breaks and negligent maintenance of the channel and levees. Two breaks several miles apart occurred on the right bank and one break on the left bank. Stover himself apparently suffered from the break called Gum Tree on the right bank. Other breaks were at the Western Pacific Interceptor Canal levee on the right bank and one at Nicolous on the left bank. All breaks resulted from the runoff from the same storm.

of experience, would not be anticipated by a normal person using ordinary care." Then it went to to say § 702c "does not apply to 'man-made floods' which result solely from negligent acts." Then the term "man made flood" was defined as "a flood which is created solely by the construction or fabrication of a barrier which, but for the barrier, would not have been impounded."

In its findings of fact the court said: the waters were unusual and extraordinary. For amplification of the court's findings see the court's opinion, Stover v. United States, 204 F. Supp. 477. Evidence of negligent construction was excluded as not being within the issues of the trial on the applicability of § 702c.

If the court adhered to its original definition, we believe it found that the rains and runoff were not foreseeable. If that be the case, would one even reach the applicability of § 702c? Under general negligence is there ever liability for the thing that cannot reasonably be foreseen by the ordinary prudent person who plans waterways?

We hold that 33 U.S.C. § 702c is an immunity statute covering even ordinary negligent construction or maintenance of flood works and that to hold otherwise would be a repudiation of our Clark case, Clark v. United States, 218 F.2d 446. True, as appellants point out, § 702c was only one of the legs on which Clark stood, and one of the other legs was sufficient for the case. But we cannot call it pure dicta. If it was half dicta, we believe it good dicta. Also, the leading case, National Manufacturing Co. v. United

States, 8 Cir., 210 F.2d 263, holds § 702c to be an immunity statute. And, it is a well reasoned case. We affirm on the ground, negligence or no negligence, § 702c precludes recovery here.

Appellants say the section applies to natural but not to man made floods. They rely heavily on the draft form of the 1928 Flood Control Bill out of which present § 702c emerged. Also, they rely strongly on Congressional colloquy at the time of the adoption of the 1928 flood control bill. But all the colloquy just cannot overcome plain language. And there really would not be any reason to legislate on damage caused purely by nature.

Appellants finally contend that if 33 U.S.C. § 702c bars a suit for damage caused by negligent federal planning of a flood control project, then the section is unconstitutional as causing a taking without just compensation, proscribed by the Fifth Amendment.

An isolated injury is not considered a taking. Prior to the Federal Tort Claims Act if one was hit by a negligently driven post office truck and even one's life was "taken," there seems to have been no authority that that was a taking requiring compensation under the Fifth Amendment.

There is no pleading that the construction of the Feather River system levees has resulted in a permanent taking of any right on or over the plaintiffs' land. It is not framed at all in the terms of United States v. Causby, 328 U.S. 256, the airplane noise case. The claims so far as we have them in the record

would seem to exceed the present maximums for district courts under the Tucker Act.[3]

The appellants would have us abolish federal governmental immunity (at least in cases like this) and rely on recent state decisions which do it. The state decisions do not yet say that a legislature cannot establish governmental immunity.

It may be that morally and financially the plaintiffs have been grievously wronged by their government; that in protecting others it injured them. It is not committed to us to remake the statute. That the limitation should happen to be in the statute is understandable. Appropriations for flood control do not come automatically. Dozens of congressmen have no flood control problems. Perhaps, as a condition to their consent to flood control appropriations, they impose such limitations as § 702c.

Congress can change § 702c and the Federal Tort Claims Act if it wants to do so. We cannot.

Judgment affirmed.

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[3] 24 Stat. 505, 28 U.S.C. § 1491, et seq.

United States Court of Appeals
for the Ninth Circuit

Raymond L. Stover, et al., Appellants, vs. United States of America, Appellee.		No. 18,275

[June 9, 1964]

On Petition for Rehearing

Before: CHAMBERS, and DUNIWAY, Circuit Judges, and TAYLOR, District Judge.

PER CURIAM:

The petition for rehearing is denied.

CHAMBERS, Concurring:

In their petition for rehearing, appellants challenge the statement in our opinion which is as follows:

> "Appellants finally contend that if 33 USC 702c bars a suit for damage caused by negligent federal planning of a flood control project then the section is unconstitutional as causing a taking without just compensation proscribed by the Fifth Amendment."

They say:

> "Appellants' contention with respect to the constitutional question was that Section 702c, if construed as an immunity statute, would be uncon-

stitutional as a *denial of due process of law* as it would destroy a right without providing a reasonable substitute."

Whichever way we state it, due process of law or taking without just compensation, we are in the Fifth Amendment and we end up the same place. And that is, short of a taking, historically on a tort one has had to have the consent of the federal government to sue it.

Appendix B

"Docketed"

United States Court of Appeals
For the Ninth Circuit

Raymond L. Stover, et al., Appellants, vs. United States of America, Appellee.	No. 18,275

JUDGMENT

APPEAL from the United States District Court for the Northern District of California, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Div. and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 7, 1964